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No. 83-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; and MERICAN CURTIS, LTD.,
Petitioners,

v.

CATERPILLAR TRACTOR CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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February 15, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioners, Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd. (collectively "Merican") have filed a Supplemental Brief in support of their petition for a writ of certiorari. To support the supplemental filing, Merican cites *Crimpers Promotions Inc. v. Home Box Office, Inc.*, 554 F. Supp. 838 (S.D.N.Y. 1982), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 65,772 (2d Cir. 1983), *reprinted in* petitioners' Supplemental Brief Appendix at 1-18 (hereafter cited as "Supp. App. at ——").

Without a single citation to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the district court in *Crimpers Promotions* on December 30, 1982, rejected the defendants' contention that the plaintiff in that case lacked standing.

554 F. Supp. at 847. On appeal, the Second Circuit was asked to decide,

> [W]hether a company organized to hold a trade show to facilitate contracts between producers of cable television programming and local cable television stations has standing to prosecute an action under § 4 of the Clayton Act against two companies which are alleged to dominate the business of purchasing and assembling programming from producers and selling it to the stations.

5 Trade Reg. Rep. at p. 67,173 (Supp. App. at 2.). The Second Circuit affirmed the district court, holding that the plaintiff did have standing.

Here, Caterpillar Tractor Co.'s motion for summary judgment, based upon the rule of *Illinois Brick*, did not contest Merican's standing. On the contrary, the issue presented to and decided by the Third Circuit, and now presented to this Court, expressly assumes that the Merican companies do have standing.

The question presented in this case is "analytically distinct" from the standing question addressed in *Crimpers Promotions*. 5 Trade Reg. Rep. at pp. 67,175-76 (Supp. App. at 9-10); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476 (1982); *Illinois Brick*, 431 U.S. at 728 n.7. This case presents the question whether the rule and principles of *Illinois Brick* bar the damages claims of these indirect-purchaser plaintiffs who are attempting to make offensive use of a passing-on theory of injury and damages. The Third Circuit properly determined, in accordance with this Court's decisions and those of all Courts of Appeals that have addressed the question, that *Illinois Brick* applies to bar plaintiffs' claims in these circumstances.

Crimpers Promotions has nothing to do with the issue of this case: in *Crimpers Promotions* there was no indirect purchaser, no allegedly illegal overcharge passed

through a chain of distribution, and thus no risk of duplicative recovery or overly complex, hypothetical damages theories that were found to be present in this case by the Third Circuit. *Crimpers Promotions* correctly applied this Court's standing law to the facts of that case. It is, however, simply not relevant to the analytically distinct question presented by Merican's petition. Neither the facts nor the holding in *Crimpers Promotions* in any way conflicts with the Third Circuit's decision in this case.

CONCLUSION

There is no conflict among the Courts of Appeals on the issue presented in plaintiffs' petition, and, as demonstrated in Caterpillar's Brief in Opposition, plaintiffs have shown no other reason warranting a grant certiorari. The petition should be denied.

Respectfully submitted,

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